UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

In the Matter of: UNITED STEEL PAPER & FORESTRY RUBBER MANUFACTURING ENERGY ALLIED INDUSTRIES AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, Charging Party, -and- ROEMER INDUSTRIES, INC., Respondent.	CASE NO. 08-CA-124110 ADMINISTRATIVE LAW JUDGE DAVID GOLDMAN

RESPONDENT ROEMER INDUSTRIES, INC.'S REPLY TO COUNSEL FOR THE GENERAL COUNSEL AND THE CHARGING PARTY'S ANSWERING BRIEFS TO EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE DAVID I. GOLDMAN'S DECISION

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A. INTRODUCTION

Respondent Roemer Industries provides the following reply to both the United Steelworkers (Charging Party) and the General Counsel's response briefs to Respondent's Exceptions to Administrative Law Judge David Goldman's Decision in the above captioned matter.

1. ALJ Goldman Erred by Vacillating Between Whether He Strictly Applied the Federal Rules of Evidence.

As previously argued by Respondent, the National Labor Relations Board's Rules and Regulations state that the rules of evidence need not be strictly applied. Judge Goldman decided to follow the Federal Rules of Evidence for most of the hearing, though he routinely-and in somewhat of an ad hoc manner-permitted hearsay evidence and refused to hear relevant evidence. According to *Capitol Fish*, Administrative Law Judges should err on the side of including hearsay testimony. As a result of Judge Goldman's refusal to admit relevant hearsay, neither party was permitted to establish details of the Haas grievance or further develop testimony that supported their theories of the case.

Contrary to the General Counsel's assertion in its Answering Brief to Respondent's Exceptions, the Company was not required to make an offer of proof or forever hold its peace. Respondent did not waive its right to except to the Judge's exclusion of relevant evidence by not making an offer of proof. While Fed. R. Evid. 103(a) favors offers of proof, the Federal Rules of Evidence were not strictly applied throughout the duration of the trial. To require parties to guess when and under what circumstances the ALJ would require strict compliance with the rules is a burden that cannot be placed on any party.

2. The ALJ Erred by Excluding Relevant Testimony Regarding the Underlying Haas Grievance, Thereby Preventing Respondent from Developing its Theory of the Case.

The equities of this case, especially because the ALJ relied upon the totality of the circumstances, required the inclusion of relevant evidence pertaining to the Hass grievance.

The merits of the Haas grievance are highly relevant to the instant case–the more that Haas' grievance lacked merit, the more probable it is that Merrick would have needed an employee to change his story about the underlying facts.

The Charging Party's Brief to Respondent's Exceptions highlights this exact paradigm. For it states, "...all three witnesses testified at the hearing (Merrick, Dolata, and Johnson), and none of them testified that such a conversation took place wherein Merrick was trying to get Johnson to change his story." The introduction of relevant testimony about the Hass grievance, and the fact that Merrick and Dolata did not want it to be filed, did not want to investigate it, and knew that it was meritless, would have bolstered Respondent's theory of the case at the expense of the credibility of the three bargaining unit members.

Worth noting, the briefs of both the Charging Party and the General Counsel did not refute Respondent's assertion that Judge Goldman oddly and erroneously concluded that tolerance limits went unmentioned at trial despite being the focus of its pre-trial position paper. Respondent previously drew the Board's attention to the Judge's untruth and does so again with the acquiesced support of the Charging Party and the General Counsel. Specifically, counsel for Respondent attempted to elicit testimony regarding tolerance limits on pages 95 and 96 of the trial transcript, but the Judge refused to allow that line of questioning. It is disingenuous of the Judge to disallow testimony about tolerance limits at trial and then use the lack of testimony about tolerance limits as an element in his decision making process to rule against Respondent.

3. The ALJ Erred by Substantially Minimizing the Level of Bullying Endured by Johnson.

Here, the level of bullying endured by Brad Johnson far surpassed the levels found to be sufficient to discipline union stewards in other cases. While the Union and the General Counsel both draw the Board's attention to the fact that some of the cases cited by Respondent are arbitration cases, neither party refuted the factual similarities between the instant case and the ones cited in Respondent's Exceptions brief.

In addition to factually similar case law upholding the discipline of union stewards, Respondent continues to request the Board to focus on the effect Merrick and Dolata had on Brad Johnson and not whether either of them used profanity or became violent. The Judge's and Union's assertion that employees "may be 'subjectively annoyed or angered' by union activities carried out by one's coworkers" is not carte blanch permission to do whatever one wants to a coworker.

The General Counsel's absurd conclusion that Employers do not have a duty to protect their employees is astonishing and riddled with fallacy. For example, the very first sentence of the Occupational Safety and Health Act of 1970, of which the entire Occupational Safety and Health Administration was created to enforce, serves "[t]o assure safe and healthful working conditions for working men and women...." Further, workers compensation systems, intentional tort claims, violence at work programs, negligent hiring and negligent retention claims, intentional and negligent infliction of emotional distress claims, and others legal theories specifically hold employers liable to protect employees from harm. For the General Counsel to argue otherwise is ludicrous.

Taking the General Counsel's position at face value that "the Act protects employees who engage in union activities even where the efforts to persuade may be robust and vigorous" does not relate to the facts of the instant case. According to the General Counsel, "the consequence may be that some employees may feel annoyed or upset by the efforts to persuade them, but they may have to accept a certain level of annoyance if the purpose of the Act is to be achieved." Again, Brad Johnson was not annoyed; he was scared, he shook, and he suffered from heart palpitations as a result of what occurred on the back stoop of the building immediately after he was approached by Merrick and Dolata.

4. The ALJ Erred by Placing Too Much Weight on the Absence of Information in Fraley's Note to Merrick's File and the Timing of When that Note was Created.

Judge Goldman's conclusion that a note created by Ann Fraley at some point after she met with Merrick and Johnson in her office as a result of Johnson being visibly frightened after Merrick and Dolata approached him was a "contemporaneous statement of the incident" is unfounded and erroneous. Fraley did not take "any notes as part of [her] investigation." To label a piece of paper with a few words on it, that she created after the event occurred and at the instruction of the human resource officer, a "contemporaneous statement of the incident" is legal semantics.

According to the Union, "Not only is the record evidence devoid of any documentation of Merrick and Dolata instructing Johnson to give false testimony, but is also devoid of any explanation as to why Fraley's note and the discipline notices given to Merrick and Dolata make no reference to this alleged plot." Hindsight is 20/20. Had Fraley known that the brief meeting in her office in September 2013 would result in a trial in August 2014, she may have done things differently. Had Fraley been a trained human resource professional instead of a former bargaining unit member who was rewarded with a management position for all her hard work, she may have done things differently. Had Fraley known that Johnson would have changed his story from the one he told her to the one he testified to at trial, she may have done things differently. But she didn't know any of those outcomes, and she should not be penalized now for what she did not know then.

General Counsel's assertion that Respondent "failed to clarify its witness' belief or understanding" is confounding. Further perplexing is the General Counsel's statement that "If Fraley misunderstood questions posed to her at the hearing, Respondent had the opportunity to clarify at the hearing." To be clear, at no point did Respondent assert that Fraley misunderstood any question about the note. Rather, the questions posed by General Counsel were extremely broad and allowed for multiple interpretations of both the question and the answer.

5. ALJ Goldman Erred by Not Applying *Wright Line*, Since it is the Most Appropriate Test to Use when Reviewing Employer Discipline for Conduct Between Coworkers

The ALJ used the totality of the circumstances test. The Union and General Counsel advocated for *Atlantic Steel* to be used before jumping behind the Judge's test after his decision was rendered. Respondent believes *Wright Line* is the appropriate standard for which to analyze this case. Dolata and Merrick would have been disciplined for their behavior even in the absence of the grievance investigation. Despite both the Union and the General Counsel drafting their post-hearing briefs under the belief that *Atlantic Steel* should apply, *Atlantic Steel* should not apply because the conduct at issue is between co-workers, not between management and a union steward, as in all other cases that apply *Atlantic Steel*.

If the Board upholds the Judge's use of the totality of the circumstances test, which is similar to the colloquially named "smell test", a clear standard should be adopted that allows an employer to discipline an employee for improper conduct toward a fellow co-worker, perhaps in the form of a burden shifting analysis. Here, Respondent conducted a reasonable investigation into the conduct complained of by Johnson. Although his subjective feelings should not be used as a standard, clear evidence of the employee's reaction, paired with a prompt investigation by the employer, should not prohibit the type of discipline meted out here. If an employer cannot discipline an employee for conduct toward a fellow employee, based on the employer's knowledge after a reasonable investigation, an employer is hamstrung to do anything at all. An employer's ability to protect co-workers from inappropriate conduct is completely limited and bullying by union stewards becomes permissive.

B. CONCLUSION

Respondent respectfully submits that the record, as set forht at the hearing, the evidence that was prohibited from being set forth at the hearing, and the details further flushed out in the instant Briefs amply support respondent's exceptions to the administrative law judge's

decision. Accordingly, respondent respectfully requests that the board refuse to enforce that decision.

Respectfully submitted,

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PROOF OF SERVICE

A copy of the foregoing was served on December 30, 2014, pursuant to Section 102.114(i) of the Board's Rules and Regulations, by electronic mail to the following:

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